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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-427

JOHN R. MARTIN and THEIL TECHNICAL SERVICES, INCORPORATED,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Petitioners John R. Martin and Theil Technical Services, Incorporated, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered June 11, 1975, affirming the judgments of conviction entered

on December 9, 1974, in the Eastern District of New York (Weinstein, J. and a jury).

OPINIONS BELOW

The judgment of the Court of Appeals was entered June 11, 1975, without opinion (1a). The judgment of the District Court upon the jury's verdict was entered December 9, 1974, without opinion. No proceedings below were reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 11, 1975. No rehearing was sought. This petition is filed beyond the time prescribed in Rule 22(2) of the Rules of this Court. Petitioners were never advised by their counsel below of the Court of Appeals' judgment until after the time had run, and they learned of the 30 day limit only upon consulting new counsel recently, all as demonstrated in the accompanying affidavit of John R. Martin (4a). Petitioners' untimeliness is therefore excusable and this Court has jurisdiction. *Schacht* v. *United States,* 398 U.S. 58 (1970).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Does a mere "presumption of regularity of administrative proceedings" suffice under due process standards to meet the government's burden of proof of an essential jurisdictional element of the case (namely, that the prime contracts be "negotiated" and not publicly bid) where no evidence establishes the essential element and where the statutory scheme makes the presence of the jurisdictional element (a negotiated contract) less likely than its absence?

STATUTES INVOLVED

Set forth in the Appendix are the due process provisions of the Fifth Amendment; 41 U.S.C. §§ 51, 52 and 54; and portions of 10 U.S.C. § 2304.

STATEMENT OF THE CASE

Theil Technical Services, Inc., of Long Island, New York, was engaged in the preparation and publication of technical aircaft manuals for the aerospace industry, principally as a subcontractor for aircraft manufacturers holding prime government contracts. John R. Martin was and is president of Theil. Grumman Aerospace Corporation was the largest defense contractor in the region, but Theil was not on Grumman's list of approved subcontractors before 1971 because Theil had previously refused to pay kickbacks to Grumman purchasing agents. In 1971 Martin, Theil's new president, sought Grumman's business because the entire aerospace industry at the time, except Grumman, was depressed. Grumman employees told Martin that Theil could do business with Grumman only by paying them kickbacks. Martin succumbed to the economic pressure and between 1971 and 1974, he caused Theil to pay $4,000 in kickbacks to Grumman employees. Virtually all Grumman subcontractors paid kickbacks for many years, totaling about $500,000. When the scheme was uncovered, thirty-three (33) individuals and companies were indicted. Martin, Theil and Theil's general manager were indicted separately in two indictments for conspiracy to defraud the United States under 18 U.S.C. § 371 and for substantive violations of the anti-kickback statutes relating to negotiated government contracts, 41 U.S.C. §§ 51, 54. Martin and Thiel were convicted on all counts. At

trial, Martin admitted paying the kickbacks but asserted that he did so under severe economic duress. Grumman employees as government witnesses admitted that Theil had to pay the kickbacks to get the business from Grumman. Theil's bids and its performance were otherwise satisfactory. The defense of economic coercion was raised at trial. Martin's counsel did not raise on appeal the District Court's error in refusing to charge the jury that economic coercion may be a defense if it negatives criminal intent. On appeal, the Court of Appeals was asked to reverse because of the absence of evidence that Grumman's prime contracts were "negotiated."

No government witness testified that the contracts were negotiated. No Grumman witness knew whether they were negotiated. Some government forms were put in evidence showing a small check in a box marked "negotiated" but no evidence verified their accuracy, and in fact some evidence showed that competitive bids were let. On the record, there was no evidence whether the contracts were negotiated. Instead, government counsel relied upon the *absence* of proof that they were *not* negotiated and the presumption that administrative proceedings are regular. Government counsel said:

> ". . . [T]here has been no evidence in this case that they were improperly negotiated and we have the presumption of the regularity of administrative proceedings. In the absence of any evidence to the contrary, we have the presumption that they were properly negotiated." (Tr. 576.)

On appeal, the government asserted that "appellants overlook the presumption of regularity which attaches to official proceedings and acts . . . Moreover, appel-

lants introduced no evidence indicating that the prime contracts were not negotiated." (G. Br. p. 10). The conviction was affirmed by the Court of Appeals. Martin was originally sentenced to serve six months of a two year prison term and was fined $35,000. Theil was fined $35,000. On August 4, 1975, Martin's prison term was reduced to three months. Martin was the only defendant in the entire kickback ring who received a prison sentence.

The government's position that it was entitled to rely upon a judicially created presumption of adminstrative regularity rather than proof in the record sufficient, if believed, to overcome reasonable doubt, is the dangerous proposition which petitioners challenge. Federal jurisdiction was vested in the District Court pursuant to 18 U.S.C. § 3231 and the federal criminal statutes involved, 18 U.S.C. § 371, 41 U.S.C. § 54.

REASONS FOR GRANTING THE WRIT

A presumption in favor of the prosecutor is always to be suspect and is perforce a dangerous threat to due process. A presumption is a substitute for proof and it therefore tends to conflict with a defendant's constitutional right to a presumption of innocence unless overcome by evidence which, if believed, is sufficient to overcome a reasonable doubt. Under what guidelines and circumstances may a presumption be deemed "evidence" sufficient to support conviction?

The criminal statutes here require a finding that the contracts were "negotiated." A "negotiated contract" is defined as one "made without formal advertising." 41 U.S.C. §§ 51, 52. The government produced no evidence that the contracts were negotiated and were not

awarded pursuant to advertisements for bids. It would seem to have been a simple chore to call a government contracting officer to testify from government records about the nature of the prime contracts. The government declined to do so, instead relying upon the vague notion that the "administrative regularity" of a check mark in a bureaucratic form was to be presumed.

This Court has developed a standard against which presumptions favorable to the government will be measured. For a presumption to be a valid substitute for proof it must be a reasonable one, in accord with probabilities and common experience. *Leary* v. *United States,* 395 U.S. 6, 36 (1969); *Tot* v. *United States,* 319 U.S. 463 (1943), *United States* v. *Gainey,* 380 U.S. 63 (1965); *United States* v. *Romano,* 382 U.S. 136 (1965). A presumption is akin to judicial notice; both are unproved evidentiary substitutes whose validity depend upon the fact that they are so universally regarded as true. Tested against this standard, the government's use of the presumption of administrative regularity must fail, because the federal statutes governing public contracts clearly make advertised bidding the rule and negotiations the exception, so that there is no rational support for the presumed "fact." Since negotiated contracts are much less likely, a presumption of their existence defies common experience and reality. 10 U.S.C. § 2304 provides that public contracts "shall be made by formal advertising" in all feasible cases unless one of the exceptions enumerated therein is satisfied. By enacting 10 U.S.C. §§ 2271-2277, the Congress made quite plain its desire to encourage public competitive bidding in the military aircraft industry.

Any "presumption" of validity which might arise to support the otherwise unsupported bureaucratic checkmark is overcome by the actual probabilities. At the least, such a presumption is cancelled out by the contrary probability. No presumption can by itself overcome the presumption of innocence as a matter of law; the jury is entitled to reject the presumption—unless it is a constitutionally permissible conclusive presumption. Where the presumption itself is weak at best and invalid at worst, then guilt on the element of the crime cannot be supported under the reasonable doubt standard.

Since the government must establish every element of the offense beyond a reasonable doubt, *Davis* v. *United States,* 160 U.S. 469 (1895), Martin's conviction is infirm because the presumed fact relied upon has no support.

Petitioner is not challenging the presumption of administrative regularity as such, but rather its use to prove negotiated contracts. The inference that the contracts were negotiated is "arbitrary because of lack of connection between" the presumption of regularity and the fact of negotiation "in common experience." *Tot, supra,* 319 U.S. at 467-68.

The government actually relied upon a presumption *plus* an inference to establish that the contracts were negotiated. First, the government claimed that the checkmarks in the contract forms allowed an inference of negotiation and second, that negotiation was proper and lawful in these instances. Although the District Judge was troubled about the adequacy of this "proof," he ultimately ruled it sufficient (Tr. 574, 576-78, 739).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

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Counsel for Peiitioner

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of June one thousand nine hundred and seventy-five.

Present: Hon. Wilfred Feinberg, Hon. James L. Oakes, Hon. Ellsworth A. Van Graafeiland, *Circuit Judges,*

United States of America, *Plaintiff-Appellee*

v.

John Martin and Theil Technical Services, Inc., Robert Rutkowski, *Defendants*

John Martin and Theil Technical Services, Incorporated, *Defendants-Appellants.*

75-1076

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court of the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

/s/ A. Daniel Fusaro,
A. Daniel Fusaro,
Clerk

By: Vincent A. Carlin,
Vincent A. Carlin,
Chief Deputy Clerk.

AMENDMENT V

No person shall be . . . deprived of life, liberty, or property, without due process of law.

41 U.S.C. § 51. Fees or Kick-Backs by Subcontractors on Negotiated Contracts: Recovery by United States: Conclusive Presumptions: Withholding of Payments

The payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor, as defined in section 52 of this title, (1) to any officer, partner, employee, or agent of a prime contractor holding a negotiated contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever; or to any such prime contractor or (2) to any officer, partner, employee, or agent of a higher tier subcontractor holding a subcontract under the prime contract, or to any such subcontractor either as an inducement for the award of a subcontract or order from the prime contractor or any subcontractor, or as an acknowledgment of a subcontract or order previously awarded, is prohibited. The amount of any such fee, commission, or compensation or the cost or expense of any such gratuity or gift, whether heretofore or hereafter paid or incurred by the subcontractor, shall not be charged, either directly or indirectly, as a part of the contract price charged by the subcontractor to the prime contractor or higher tier subcontractor. The amount of any such fee, cost, or expense shall be recoverable on behalf of the United States from the subcontractor or the recipient thereof by setoff of moneys otherwise owing to the subcontractor either directly by the United States, or by a prime contractor under any contract or by an action in an appropriate court of the United States. Upon a showing that a subcontractor paid fees, commissions, or compensation or granted gifts or gratuities to an officer, partner, employee, or agent of a prime contractor or of another higher tier subcontractor, in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the cost of such ex-

pense was included in the price of the subcontract or order and ultimately borne by the United States. Upon the direction of the contracting department or agency or of the General Accounting Office, the prime contractor shall withhold from sums otherwise due a subcontractor any amount reported to have been found to have been paid by a subcontractor as a fee, commission, or compensation or as a gift or gratuity to an officer, partner, employee, or agent of the prime contractor or another higher tier subcontractor.

41 U.S.C. § 52. Same: Definitions

For the purpose of sections 51-54 of this title, the term "subcontractor" is defined as any person, including a corporation, partnership, or business association of any kind, who holds an agreement or purchase order to perform all or any part of the work or to make or to furnish any article or service required for the performance of a negotiated contract or of a subcontract entered into thereunder; the term "person" shall include any subcontractor, corporation, association, trust, joint-stock company, partnership, or individual; and the term "negotiated contract" means made without formal advertising. Mar. 8, 1946, c. 80, § 2, 60 Stat. 38; Sept. 2, 1960, Pub.L. 86-695, 74 Stat. 740.

41 U.S.C. § 54. Same: Penalties

Any person who shall knowingly, directly or indirectly, make or receive any such prohibited payment shall be fined not more than $10,000 or be imprisoned for not more than two years, or both. Mar. 8, 1946, c. 80, § 4, 60 Stat. 38; Sept. 2, 1960, Pub.L. 86-695, 74 Stat. 741.

10 U.S.C. § 2304. Purchases and Contracts: Formal Advertising: Exceptions

(a) Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising in all cases in which the use of such method is feasible and practicable under the existing conditions and circumstances. If use of such method is not feasible and practicable, the head of an agency, subject to the requirements for determinations and findings in section 2310, may negotiate such a purchase or contract, if— . . .

Affidavit of John Martin

STATE OF NEW YORK }
COUNTY OF NASSAU } ss:

JOHN MARTIN, being duly sworn, deposes and says:

1. I am the petitioner for a writ of certiorari in this case. I am the president of Theil Technical Services, Inc. I make this affidavit to demonstrate that I was not aware of the judgment of the Court of Appeals until after the 30-day time period for filing my petition had expired.

2. On about July 28-30, 1975, I was advised for the first time that the Court of Appeals had decided my case one and one-half (1½) months earlier on June 10, 1975. The attorney who represented me at trial and before the Court of Appeals never advised me of the Court of Appeals' decision before July 28-30. I did not know that I had only thirty (30) days from June 10 to petition for certiorari until September 9, 1975, when I sought new counsel to file my petition and he so advised me.

3. If my trial counsel had told me of the Court of Appeals' decision during the 30-day time period, I would have instructed him to seek Supreme Court review. As it happened, I had no opportunity to exercise my rights because I was ignorant of the June 10 decision.

4. In fact, I was not aware of any appellate steps which my trial counsel took. Although I knew that counsel was appealing my conviction to the Court of Appeals, I did not know when he filed my brief, and I never had the brief before it was filed. I anticipated that my counsel would raise several issues, particularly the question whether economic coercion was a defense. I learned only after he filed the brief that only one issue was raised.

5. For these reasons, I respectfully request the Court to deem my failure to petition for certiorari within thirty

(30) days as excusable on the ground of compelling circumstances; namely, my ignorance of the Court of Appeals' decision until only recently.

/s/ JOHN MARTIN
JOHN MARTIN

(Subscription Omitted in Printing)